IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-554

Supreme Court, U. S.
F I L E D
MAR 24 1972
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DENNIS L. LIEPMAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING

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ORDER BELOW

Petitioner respectfully seeks a review of the Order of the Second District Court of Appeal affirming a judgment of the Superior Court for the County of Los Angeles, sentencing Petitioner to three years probation, the first eight months to be spent in County Jail.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is March 13, 1970 (R.C.A. Judgment).

An appeal was taken to the District Court of Appeal as prescribed under California law. That Court affirmed the Trial Court's judgment by a vote of 2 to 1, on July 15, 1971. Thereafter, a Petition for Hearing was directed to the California Supreme Court, the State's highest tribunal qualified to hear the issue in the case, and that Petition was denied on September 8, 1971.

A Petition for Certiorari was timely lodged with this Court on October 20, 1971.

On February 28, 1972, this Court denied the Petition for Certiorari.* The Petition for Rehearing is herein filed as provided in Rule 58 of the Rules of this Court.

* Mr. Justice Douglas voted to grant the Petition.

QUESTION PRESENTED FOR REVIEW

I

A POLICE OFFICER'S OBSERVATION, MADE POSSIBLE ONLY BY WEEDING THROUGH OBJECTS ON A PLATFORM CONNECTED TO A BUSINESS STORAGE GARAGE, BENDING DOWN TO THREE FEET ABOVE THE PLATFORM, AND USING A FLASHLIGHT TO OBSERVE THE INTERIOR OF THE PREMISES THROUGH A TINY AND ALMOST INACCESSIBLE APERTURE, VIOLATED PETITIONER'S REASONABLE EXPECTATION OF PRIVACY AS GUARANTEED BY THE FOURTH, FIFTH AND NINTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS MADE APPLICABLE TO THE STATE BY THE FOURTEENTH AMENDMENT.

I

A POLICE OFFICER'S OBSERVATION, MADE POSSIBLE ONLY BY WEEDING THROUGH OBJECTS ON A PLATFORM CONNECTED TO A BUSINESS STORAGE GARAGE, BENDING DOWN TO THREE FEET ABOVE THE PLATFORM, AND USING A FLASHLIGHT TO OBSERVE THE INTERIOR OF THE PREMISES THROUGH A TINY AND ALMOST INACCESSIBLE APERTURE, VIOLATED PETITIONER'S REASONABLE EXPECTATION OF PRIVACY AS GUARANTEED BY THE FOURTH, FIFTH AND NINTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

In Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507 (1967), this Court reversing petitioner's conviction on the basis of electronic surveillance in the absence of antecedent judicial approval, held that "the Fourth Amendment protects people, not places".

In Terry v. Ohio, 392 U.S. 1,9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), this Court, in an oft-quoted statement, held that

> "wherever an individual may harbor a reasonable 'expectation of privacy' he is entitled to be free from unreasonable governmental intrusion."

Admittedly, as this Court stated in Katz v. United States, 389 U.S. 347, 351-352, that which

> "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection (Citatibns omitted). But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected."

It is unfortunate that many lower state courts have neglected to preserve the vitality of the statements in Katz and Terry. Moreover, it appears, as in Petitioner's case, that the lower courts have equated the ability and willingness of law enforcement officers to find and utilize tiny and almost inaccessible apertures into a person's domicile or business premises with a willingness on the part of that person to abandon any expectation of privacy. In addition, it is said by these courts that if law enforcement officers are able to view the interior of a person's domicile by weeding through objects on a platform which obstruct their view of a tiny and inaccessible aperture and by then employing a flashlight to view the interior of those premises, the objects seen within are in plain view. It is

Petitioner's belief that to uphold this view is to require that citizens turn their homes and business premises into fortresses to insure their own privacy. A man's home would then cease to be his "castle", but would become his dungeon.

The lower court held in the case at bar that Petitioner had exhibited no reasonable expectation of privacy for four reasons. First, employees of Petitioner might have reason to go into the area of the platform in question and, assuming they too "weeded through" the objects on the platform (as pointed out by Presiding Justice Kaus in dissent), bending down to the aperture, be able to view the interior of the garage. Second, although Petitioner had placed a padlock on the front doors of the garage, the Court felt that this was to insure the prevention of theft and not to prevent the viewing of the interior of the garage.

But as pointed out by the Court, Petitioner had hung a curtain inside, separating the rear portion (that into which the officers had looked) from the front portion. [Appendix "A", pp.4, n.3, 11.] Third, the Court reasoned that a hole in the wall was equivalent to leaving an opening in window curtains, noting that an opening indicates the non-existence of a strong desire for privacy. [Appendix "A", pp.11-12.] The majority did not believe it significant that the officers had to stoop and use a flashlight to view the interior.. [Appendix "A", p.14.] Cf. Brock v. United States, 223 F.2d 681 (5th Cir.1955) (police officers' trespass onto defendant's property and looking into a bedroom window violative of Fourth Amendment); California v. Hurst, 325 F.2d 891 (9th Cir. 1963) (police officers' trespass

into defendant's backyard, seeing and opening paper bag placed under back porch, violative of Fourth Amendment). Fourth, and without explanation, that the police officers had a right to be on Petitioner's platform, having had to pass through two chain link fences (padlocked but not locked at the time) on Petitioner's property. [Appendix "A", p.16.] Presiding Justice Kaus, in dissent, believed that Petitioner had "manifested an objectively reasonable expectation of privacy", reasoning as follows:

> "Although the pipe was visible from the rear of the platform, there is no suggestion in the record that the pill machine could have been observed from that location, even with the use of a flashlight. Robison testified that

he was able to approach the wall where the pipe protruded by 'kind of weeding' his way through the objects on the platform." [Appendix "A", p.18.]

That Petitioner's premises are part of his business does not mean the abandonment of his Fourth Amendment rights. It has long been settled that commercial premises enjoy Fourth Amendment protection from unreasonable searches and seizures. See v. Seattle, 387 U.S. 541,543, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1968); Mancusi v. DeForte, 392 U.S. 364,367, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); Hoffa v. United States, 385 U.S. 293,301, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); Go-Bart Importing Co. v. United States, 282 U.S. 344,357, 51 S.Ct. 153, 75 L.Ed. 374 (1931); Gouled v. United States,

255 U.S. 298,305,309, 41 S.Ct. 261 (1921). Moreover, it is submitted that if a defendant is entitled to a reasonable expectation of privacy while telephoning from a public phone, that same protection should be afforded for those in their domiciles or business premises. For, as this Court held in Katz, that which a person

> "seeks to preserve as private even in an area accessible to the public, may be constitutionally protected." [389 U.S. 347,351-352.]

If the courts can circumvent the Katz decision by legitimizing police conduct that allows officers to place objects in "plain view" by that conduct, then citizens will have to turn their homes and businesses into fortresses in order to convince those

courts of a manifestation of a reasonable expectation of privacy. This is clearly not the intent of this Court in Katz. But, absent more stringent restrictions on the manner by which officers may assert that objects are in their plain view, it is submitted that this is the inevitable result.

Moreover, the decision of the lower court can only result in allowing law enforcement officers to employ suspect methods to place themselves in positions to view the interiors of citizens' homes and businesses in violation of the holding in Harris v. United States, 390 U.S. 234,236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). There, this Court held that

> "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

To legitimize a police officer's weeding through objects to find a minute and inaccessible aperture through which, by the use of a flashlight, he may view the interior of Petitioner's premises nullifies the decision in Harris. Cf. Brock v. United States, 223 F.2d 681,685 (5th Cir. 1955), where the court held as follows:

> "To begin with, the agents, when they appeared outside Brock's bedroom window, were in violation of his rights under the Fourth Amendment. Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that 'standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment."

Accord, People v. Regalado, 193 Cal.App.2d

437 (1961), remanded in light of Ker v. California and McDonald v. United States, 374 U.S. 497, 83 S.Ct. 1875, 10 L.Ed.2d 1044 (1963), and reversed 224 Cal.App.2d 586 (1964) (officer illegally looked through tiny aperture drilled in door of hotel room). People v. Edwards, 71 Cal.2d 1096 (1969); Britt v. Superior Court, 58 Cal.2d 469, 471-472 (1962).

Finally, to uphold the decision of the lower court may mean that courts will continue to equate "plain view" not with what one has in fact knowingly exposed to public view but rather with what law enforcement officers have been able to ferret out and expose to their own view by subtle but no less serious invasions of the privacy of the individual, his domicile and his business. As this Court noted in Johnson v. United

States, 333 U.S. 10,14, 68 S.Ct. 367 (1948):

"Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."

Should the decision of the lower court not be reviewed, but allowed to stand, we have perhaps not heeded the warning of this Court in Gouled v. United States, 255 U.S. 298,302-303, 41 S.Ct. 261, 65 L.Ed. 647 (1921):

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court

(Citations omitted) have declared the importance to political liberty and to the welfare of our country of the due observation of the rights guaranteed under the Constitution by [the Fourth and Fifth] Amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen ...It has been repeatedly decided that these amendments should

receive liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."

This argument was presented in our original Petition for Certiorari and the Court was divided as to whether to grant a hearing. Petitioner again urges that a pronouncement from this Court concerning the nature of the expectations a domiciliary may entertain regarding his privacy is compelled in view of the frequency of police invasions similar to those occurring in this case. Cf. People v. Regelado, 193 Cal.App.2d 437 (1961), vacated 374 U.S. 497, 83 S.Ct. 1875, 224 Cal.App.2d 586 (1964).

CONCLUSION

For the aforegoing reasons, Petitioner requests that his Petition for Rehearing be granted.

Respectfully submitted,

LUKE McKISSACK
Attorney for Petitioner

AFFIDAVIT

I, LUKE McKISSACK, counsel for Petitioner, certify that this Petition for Rehearing is based upon meritorious grounds not heretofore fully considered by the Court and is not interposed for purposes of delay.

Luke McKissack

LUKE McKISSACK
Attorney for Petitioner

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

On MARCH 22, 1972, before me, the undersigned, a Notary Public in and for said State, personally appeared LUKE McKISSACK known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
Louise A. Monaco
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Jan. 11, 1976

Louise A. Monaco

Notary Public in and for said State

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California, 90028. On March 22, 1972, I served the within PETITION FOR REHEARING on the Plaintiff and Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Attorney General, State of California
217 West First Street
Los Angeles, California 90012

District Attorney, Los Angeles County
Hall of Justice, Room 600
211 West Temple Street
Los Angeles, California 90012

Clerk, Court of Appeal
Second Appellate District
217 West First Street
Los Angeles, California 90012

Los Angeles Superior Court
Clerk's Office, Criminal Records
Hall of Justice, Room 448
211 West Temple Street
Los Angeles, California 90012

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on March 22, 1972, at Los Angeles, California.

H. Mallon Ley